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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1992

LLOYD EDWIN HUMPHREYS,

Petitioner,

vs.

UNITED STATES OF AMERICA
(INTERNAL REVENUE SERVICE),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court allowing an unqualified juror, who was a convicted felon selected under a faulty jury selection process to deliberate and return a verdict error?

(a) Is an unqualified juror participating in deliberation plain error as an alternate doing so would be?

(b) Is the jury verdict "unanimous" if an unqualified juror participates?

(c) Was it error to place the burden of proof on the Defendant to show bias because of an unqualified juror rather than on the prosecution?

(d) Is a faulty jury selection process that allows unqualified jurors to participate error?

(e) Is the standard for Appellate review of a statutorily "unqualified" juror that participates in deliberation and verdict plain error, or must prejudice be shown, and if so by the prosecution or defendant?

2. Whether the product of a search of a computer memory bank and word processor with attorney-client privileged information on it seized from a law office and searched without the permission required in 42 U.S.C. Section 2000aa(11) for several days beyond the scope provided in the search warrant should have been suppressed?

3. Whether affidavits supporting the issuance of a search warrant must allege probable cause that a crime was committed?

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Whether it was error for the Court of Appeals to allow an alleged lesser included offense under 26 U.S.C. Section 7207 (filing a false return) to be submitted to the jury after the close of evidence charging an offense under 26 U.S.C. Section 7201 (wilful tax evasion), as a "constructive amendment" not considered by a grand jury under which the accused was not charged or tried?

5. Whether the Circuit Court erred in allowing the trial Court one instruction on "willfulness" when the accused was claiming three defenses: (1) good faith reliance upon the "expert" C.P.A. preparing the tax returns; (2) accident, mistake or negligence of the tax preparers, his legal staff, bookkeepers, or himself; and (3) lack of any willfulness?

6. Was it error not to allow a change of venue from Iowa pursuant to 18 U.S.C. Section 3237b for tax returns filed in Texas?

LIST OF PARTIES

The parties to the proceeding in the Court whose judgement is sought to be reviewed are the United States of America (Internal Revenue Service) and Lloyd Edwin Humphreys, the Defendant below.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner-Attorney, Lloyd E. Humphreys, seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on January 22, 1993, denying Humphreys Petition for rehearing and it's earlier judgment of December 7, 1992, affirming conviction.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1992 and a Petition For Rehearing was filed. The petition was denied and judgment entered January 22, 1993, and this Petition For Certiorari relief was filed. The Court's jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Sixth Amendment, United States Constitution, which provides:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense".

2. The Fourth Amendment, United States Constitution which provides:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by other or affirmations, and particularly describing the place to be

searched, and the persons and things to be seized".

3. The Fifth Amendment, United States Constitution, which provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land, or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

4. The statutes involved in consideration of this case are: (reproduced in appendix hereto)

Federal Rules of Criminal Procedure, 8, 18, 22, 23, 24, 25, 41e(1);

42 U.S.C. Section 2000 aa 11 12 (Special consent to search law office);

18 U.S.C. Section 3237b (venue);

26 U.S.C. Sections 7201, 7202 (tax crimes);

28 U.S.C. Section 1865b (absolute disqualification for felon on jury);

28 U.S.C. Section 1867d (entitled to jury questionnaires-denied);

28 U.S.C. Section 1861-1878 (selection of venire faulty);

28 U.S.C. Section 6103h(s).

STATEMENT OF THE CASE

On August 5, 1990, a federal grand jury in Iowa returned a three count indictment against attorney, Lloyd Edwin Humphreys, for wilfully attempting to evade income taxes of $2,943.00 for 1983, $7,759.00 for 1984, and $4,011.00 for 1985, for a total of $14,713.00 in violation of title 26 U.S.C. Section 7201 (R1). On October 15, 1990 Humphreys entered a plea of not guilty to all counts. He filed a Motion To Suppress evidence seized in a search, in February, 1987, of the law office of Humphreys & Associates, Professional Corporation (with offices of attorney's representing the accused) for the reasons that: (1) the warrant was issued for searching a law office without the authority of the Assistant United States Attorney General in violation of 42 U.S.C. Section 2000 aa 11; (2) the affidavits supporting the issuance of the warrant did not allege any illegal conduct of any kind and did not, therefore, establish probable cause; (3) the I.R.S. agents seized a confidential attorney-client filed; (4) the IRS seized and removed a computer-word processor and all hardware and software containing attorney-client privileged communications; (5) contrary to the scope of the warrant and FRCP 41c(1) commanding no search to "exceed 10 days", the Internal Revenue Service retained the computer and continued to search it several days beyond the ten (10) day limitation. The Motion To Suppress was denied by the Magistrate and objections were then taken.

On February 22, 1991, the Government filed a superseding indictment in Iowa adding two additional counts of tax evasion in the amount of $8,813 for 1988 and $3,810 for 1989, concerning tax returns filed in the State of Texas. These charges were for the failure to declare capital gains on the redemption of stock and release of claims by a corporation, in which, he had personally guaranteed a loan of more than three times what he was paid, at a time when it was a Subchapter 'S' Corporation. Interest income on the installment payments was declared, but not principal for which Humphreys believed he had sufficient basis in the stock. Humphreys expert for the original indictment retained by his defense attorneys as a "Kovel" account had prepared his 1988 and 1989 tax returns. Humphreys was rearraigned on April 3, 1991, in Iowa.

On April 19, 1991, Humphreys filed Motions To Sever Counts I, II, and III from Counts IV and V and to transfer venue to Texas where he resided and the tax returns for counts IV and V were signed and filed. The Trial Court on July 2, 1991, denied the motion without prejudice to renew, because of a mistaken "concern that Counts IV and V had not been committed in the Northern District of Iowa . . . " (GB 29)

On July 12, 1991, Humphreys renewed his motions to sever and transfer and expressly cited 18 U.S.C. Section 3237b (R1-134).

The trial court overruled the Motion To Suppress Evidence from the February, 1987 search and seizure of files and computer from the law offices of the professional corporation. Later, however, the Court released

Humphreys on bond for appeal specifically finding that this issue may have merit.

Jury trial commenced on August 6, 1991. Humphreys filed a Motion To Review Juror Questionnaires but was denied because of a local rule prohibiting such review. The Defendant also submitted a jury questionnaire and voir dire questions and motion for specification of jury process, which the Court refused. During the voir dire of the venire, no information was obtained showing any disqualification of the prospective jurors until finally the Court itself asked a catch all question of those seated in the jury box and then the following transpired:

THE COURT: "Do any of you know of any matter that you want to bring to our attention that you think will have some bearing as a juror in this case that we haven't already talked about?"

JUROR FLOYD HESKETT RESPONDED:

"Thirty one years ago I was arrested for embezzlement. I received a 90-day suspended sentence, and I wanted to bring to out".

THE COURT: "We appreciate your candor in that respect. You wouldn't be here today if your citizenship rights had not been restored to you, and I believe that to be the case or you wouldn't have been permitted to serve on this jury". (TR 126-127).

After trial deliberations and verdict, it was discovered that juror Heskett was a convicted felon, whose rights had never been restored. Juror Heskett had been voting illegally for over fifteen (15) years. (NT 20). Juror Heskett has also received a discharge from military service which was *not* HONORABLE; but the reason for that was never brought out. Defendant Humphreys had been a Captain in the U.S. Army as the first defense counsel volunteering for duty in Vietnam.

The District Court Judge immediately deemed juror Heskett, convicted felon, discharged without honor from the military, as a qualified juror under 28 U.S.C. Section 1865(b) and swore him in allowing him to deliberate and render a verdict in judgment of Defendant Humphreys.

After trial and verdict, pursuant to Motion For New Trial of Humphreys, the District Court held an evidentiary hearing inquiring as to the bias; or prejudice of juror Heskett, at the conclusion of the hearing overruling the Motion For New Trial the District Court found,

> "There is no evidence in this record of any bias or unfairness on the part of Mr. Heskett. (NT 43)

Applying the standard established in the *civil* case of *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556 (1984) requiring (1) a dishonest answer on voir dire, (2) a correct response would have provided a valid basis for challenge and (3) jurors motives in failing to answer correctly affect impartiality. The Court placed the burden of proving this subjective standard of bias on Defendant Humphreys, not the lack thereof on the prosecution. No consideration was given to the plain error of violations of fundamental constitutional rights of the

accused to a unanimous verdict of twelve (12) qualified jurors; and a faulty selection process that allowed unqualified felons on the venire.

In the issuance of the search warrant which was *not* issued for the search of the professional corporation law firm but only for the personal office of the Defendant, the affidavits merely alleged $1,100.00 a year in cash was not deposited in a business account. They did *not* claim any crime and specifically did *not* claim tax evasion.

After the initial warrant was issued for the search of the Defendant's personal office, without the approval required in 42 U.S.C. Section 2000 aa 11, the IRS with 12 armed agents raided the professional corporations law firm and seized all records. That one file in a safe was identified as an attorney-client privileged file. The Internal Revenue Service took it for 4-6 hours; then returned it.

A second warrant was also obtained *without* any probable cause affidavits in order to seize client records of the law firm. The second warrant was not served on the Defendant. The second warrant was also obtained without the permission required by statute; after several hours of searching the law firm records, and after seizing the attorney-client privileged hard file ("hard" paper file in contrast to the computer attorney-client file in memory).

Upon the information obtained, all of the law firms clients were located and interviewed. (TT-238-239) The Internal Revenue Service special agent testified that records regarding cash transactions for the Defendant were "surprisingly good", "comprehensive", and that a

good system for reporting transactions was used. (TT 384).

The Defendant's tax returns for the years 1983, 1984, and 1985 were prepared by the bookkeeper for the law firm who was in the offices several days every week. All records including cash receipt information were available to him. In fact, those were prepared by him (TT 1486). He billed the firm monthly for "cash receipt reconciliation". (TT 1680-81). But the Defendant did not give him any of the records personally. The accounting tax preparer did not at any time tell the Defendant that he was preparing tax returns based only on bank deposits (TT 3-494). Defendant Humphreys was not actively involved in accounting and financial matters. (TT 3-508). The accountant-tax preparer was never denied access to any records. (TT 3-510). It was conceded, that the Defendant could not determine by looking at the fee schedules prepared by the accountant whether any particular fees were included. (TT 3-502-503).

In the case of the "Kovel" accountant who prepared the 1988 and 1989 returns giving rise to counts IV and V, he was aware at the time the returns were prepared that the stock giving rise to the alleged additional income had been "disposed of". (TT 5-1136). It was conceded, that the basis in stock of a subchapter 'S' corporation was complicated and, that it could be based upon loans to the corporation guaranteed by the Defendant. (TT 5-1139). That all records of the Defendant, including the corporation stock redemption were left with the "Kovel" accountant when the Defendant moved to Texas, in 1988. (TT 7-1505-1508).

The Defendant relied upon defenses of: (1) good faith reliance upon the "expert" C.P.A.'s preparing each and every tax return; (2) accident, mistake, or negligence of the tax preparer bookkeeper, office staff, or himself; and (3) lack of "willfulness". Instead of three separate instructions on each theory of defense the Court gave one general instruction on wilfulness and stated in part:

> "He contends that the omissions were the result of the accident, mistake or negligence, and that at the time he signed the returns he believed in good faith that the returns were true and accurate". (Instruction 8).

The Court also instructed that not only was good faith required on the part of the accused but also "that he furnished all of his income information to his accountants".

After the close of all the evidence at trial, the Court granted Defendant's Motion For Dismissal of Count III for 1985, finding that there was no tax owing for 1985, therefore, the evidence was insufficient to support a conviction. However, the Court then submitted what it termed to be a lesser included offense under 26 U.S.C. Section 7207, filing a false return. No additional evidence was taken.

The Eighth Circuit Court of Appeals overruled Humphreys issue on illegal search and seizure because he did not demonstrate "that he was prejudiced" and did not produce the attorney-client information seized by the IRS to the trial court. Although the "hard" file was returned after seizure; the computer print outs from the

word processor were not returned to the Defendant, except for those actually used as exhibits in court.

The Circuit Court denied severing Counts I, II, and III from Counts IV and V stating "while according to Humphreys, the dissimilarities in the two 'sets' of evidence are legion (time, geographical location, business entities, tax preparers, type and complexity of transactions), the similarities carry the day". They also felt the evidence of one set of counts would be admissible in a trial of the other to show a "pattern of criminal behavior". However, the trial court found in sentencing that,

> "The Court did not need to rule on the specific objections made by the Defendant because it determined the conduct discussed in Counts I, II, and III did *not constitute a pattern or common scheme . . .* "
>
> "The Court determined the Defendant's legal knowledge did not contribute in any way to the conduct of the 1988 and 1989 tax years (Counts IV and V)". (emphasis added).

It also held that the renewed motion for change of venue was within the discretion of the lower court to deny as untimely, and that venue was not based solely on mailing under 18 U.S.C. Section 3237(b).

The Appellate Court found that the unqualified convicted felon being selected by the clerk's process for the venire the Court deeming him "qualified" and his deliberating and voting on the verdict was not an abuse of discretion by the Trial Court in that there was no evidence of bias or unfairness of the juror found so it was not clearly erroneous", for the Trial Court not to grant a new trial.

In regard to the submission of the "lesser included offense" of 26 U.S.C. Section 7207 in place of 26 U.S.C. 7201 after the close of all the evidence, the dismissal of the 26 U.S.C. Section 7201 charge and immediately before submission to the jury the Appellate Court found it was to "the benefit of Humphreys" and that "adequate notice of the possibility of conviction on the lesser charge", was given when, he was charged with the greater offense. They did not deal with the difference in the elements, the lack of opportunity to rebut evidence thereon or the constructive amendment issue without grand jury submission.

The Appellate Court found that the instructions "fairly and adequately" instructed the jury, "when viewed as a whole" and that the district court has wide discretion which was not abused in this area.

A grant of Certiorari would not merely provide the explication and precedent for the conflicts and uncertainty among the circuits on the basic fundamental constitutional rights violated in this case, but it would also allow the Petitioner, Lloyd Humphreys, an attorney of thirty (30) plus years a further merited review of his case, and restore the publics faith in the sacredness of our constitutional rights to a jury trial by our peers of qualified jurors, selected by a fair process without error in deeming them qualified, the protection of our rights to privacy and attorney client privilege from illegal search and seizures, to have our day in a fair and impartial court to present evidence and rebut charges brought by grand jury indictment, with the burden of proof on the government, with proper instructions to a qualified jury on each theory of defense.

REASONS FOR GRANTING WRIT

I

The circuit courts appear to be in conflict on the participation of an unqualified juror in the deliberation and verdict in a criminal case being "plain error" and the Supreme Court of the United States has not ruled on this matter.

There is a paucity of authority of courts of record in criminal cases dealing with "unqualified" convicted felons being selected under a faulty selection process for the venire, or participating as "jurors" in deliberations and verdict. It is submitted that is because the courts through the ages have held that a fair jury trial by qualified jurors is the heart and soul of the American criminal justice system. In so doing, when that circumstances has arisen no doubt new trials were granted which accounts for few cases of record.

In this case the accused did all he could to discover the disabling nature of the convicted felon, dishonorably discharged "juror". A jury questionnaire was filed by the defense. A list of voir dire questions were submitted to the Court. A motion was made to obtain the jury information sheets in the clerk's custody. A motion was made for specification of jury selection process. All these efforts were rebuffed by the Court.

It was only after extensive voir dire questioning under which the unqualified convicted felon did *not* disclose the nature of his disability that the seed of the disclosure came to light. The Court had shut off voir dire and shortly before making the decision that the jurors would be deemed qualified asked a general question. The Court heard the "unqualified juror's" admission. The

Court then held him to be qualified and deemed him fit to sit on the jury. All without further voir dire being allowed on the issue by the defense.

It should be noted that the nature of misconduct giving rise to the unqualified convicted felon being discharged dishonorably from the military was not disclosed by him. This only came out collaterally, at the hearing on the Motion For New Trial. It could certainly be the basis of bias towards officers such as the Defendant Captain Humphreys has been.

The trial court felt compelled to turn toward a *civil* case for precedent and direction in determining whether a new trial should be granted because of (1) a faulty selection process allowing statutorily unqualified persons on the venire; (2) an unqualified juror participating in deliberations and voting on verdict; (3) whether or not a jury verdict would be constitutionally "unanimous" if an unqualified juror participating; and (4) whether it was error for the court to deem "the jury qualified" and (5) who should have the burden of proof.

The Appellate Court used the same *civil* case *McDonough*, Supra to determine the standard for reviewing these questions in a criminal case. They did not consider it plain error and agreed that the burden of proof be on the criminal Defendant at trial to show prejudice.

In our case, the unqualified felon juror had never had his rights restored, or a pardon granted. He did not disclose that but remained silent when the trial judge made the assumption that he had and deceived the Court into deeming the juror qualified.

This particular issue had never been considered by the Eighth Circuit so they and the Trial Court turned to the civil law. Although, in *United States v. St. Clair,* 855 F.2d 518 (8th Cir. 1988) a juror failed to reveal knowledge regarding a critical issue in the case and the circuit reversed Defendant's conviction. In our case if the unqualified felon juror had disclosed he had not been pardoned or his rights restored the trial judge would not have deemed him qualified for jury service and excused him for cause. That is if it was in the Sixth or Tenth Circuit Court of Appeals. See, *McCoy v. Goldstein,* 652 F.2d 654 (6th Cir. 1981); *Consolidated Gas and Equipment Co. of American v. Carver,* 257 F.2d 111 (10th Cir. 1958).

28 U.S.C. Section 1865b establishes who are unqualified for jury service. These are absolute requirements. It establishes the duty on the "District Court Judge" who "*deems* any person qualified to serve on . . . petit juries in the district court unless he . . . " (emphasis added). The judge in our case was in error when he "deemed" the unqualified felon who was dishonorably discharged from the military as qualified to be part of the venire, and on the criminal trial petit jury. This should be plain error, not discretionary conduct as the standard for appellate review.

The fundamental right to trial before an impartial jury is so basic and crucial as to demand that no vestige of suspicion be permitted to impugn the impartial method of jury selection. 28 U.S.C. Section 1865b and tradition impose the duty on the trial judge on the impanelment of a jury to assure himself "that each member of the jury is unbiased and that none of them is disqualified" (47 AmJur 2d, Jury Section 2000). It is clear that the

court has discretion as to how the voir dire is conducted but there is no discretion to deem those "unqualified" to be declared competent. A zebra does not change his stripes if he is declared to be a dove.

> "It is the duty of the Court to preserve the purity of trials by jury. Thus where the impartiality of a juror is questioned the Court must be satisfied that the juror is impartial, and it is the duty of the court to resolve any doubt on the question in favor of the Defendant. It cannot be doubted that a trial court will quickly excuse a prospective venire man if the slightest hint of prejudice is shown. In criminal cases especially, the trial judge should resolve all doubts as to the competency of the juror in favor of the Defendant . . . " (46 AmJur 2d Jury Section 268).

A challenge to the array, selecting the venire, which is not chosen in conformity with the law is not waived by exercising challenges, where there is an inherent and fatal objection to the panel a venire not qualified under the law is a nullity. (*Clinton v. Englebrecht*, 13 Wall 434, 20 L. Ed. 659). The issue of bias or prejudice when we are dealing with legal qualifications declaring a person not competent to serve on the venire, or the petit jury goes to the fundamental constitutional right to a jury trial and is not discretionary.

The venire selection process was defacto faulty. An unqualified convicted felon, dishonorably discharged from the military, who has violated the law repeatedly by voting illegally over a period of years should not be allowed to be a juror at the discretion of the trial judge. Bias or prejudice in such a case; if it is considered, should

be conclusively presumed as a matter of law. (See, *U.S. v. Wood*, 299 U.S. 123, 81 L. Ed. 78).

In our case the Defendant did everything possible to ascertain jury qualifications and competency. He filed a motion for specification of jury selection process, a motion to obtain jury questionnaires he submitted his own questionnaire, and suggested voire dire questions. The district Court denied all motions and did not allow further voir dire after the unqualified felon juror, disclosed his conviction but did *not* disclose his failure to be pardoned, or reinstated, the fact that he had been dishonorably discharged from the military and that he had voted illegally for many years.

A jury is either qualified or it is not! It should be plain error if an unqualified juror deliberates, or votes on the verdict. The Courts have held it is plain error if alternates participate in deliberations. See e.g. *U.S. v. Olano*, 934 F.2d 1425 (9th Cir 1991); *U.S. v. Lamb*, 529 F.2d 1153 (9th Cir 1975 en banc). Should not a juror ineligible to vote prohibit a "unanimous" verdict being entered? It cannot be "unanimous" because any unqualified juror does not have the legal capacity to vote. Thus it violates another basic constitutional right which is *not* discretionary with the Court.

In the recent case argued to this Honorable Court, *U.S. v. Olano* No. 91-1306 (12/9/92), the presence of even alternatives let alone unqualified persons was argued to be obvious error which was "inherently prejudicial" and was automatic reversible error, it infringes on the jury privacy and secrecy. It was admitted in argument by the government there that "plain error is one that would

result in manifest injustice" (52 CrL 3110, 1-6-93). That is the case here.

Criminal cases that did *not* involve "unqualified jurors" but that did question the dishonesty of jurors voir dire responses shows the circuits are following civil criteria in that area. *Cf. U.S. v. North,* 910 F.2d 843 (D.C. Cir 1930) (Jurors brother criminal); *U.S. v. Aguon,* 851 F.2d 1158 (9th Cir 1988) (Juror Charges Pending); *U.S. v. Casamayor,* 837 F.2d 1509 (11th Cir 1988) (Juror Police Trainee Didn't Disclose).

In our case, the status of the unqualified "juror" as a felon, dishonorably discharged, voting for years in violation of the law and his deception in not stating his rights were not restored when the Court deemed him qualified demonstrates that he is an individual that could not be trusted to conform to the Courts instructions and discharge faithfully his duties under his oath as a juror. Federal Rule Evidence 606 (b) also prohibited jurors from testifying about their deliberations in order to determine circumstances.

A Per Se Rule should be established in criminal cases that unqualified jurors, picked in a faulty selection process cannot render a verdict "unanimous". Massachusetts has such a Per Se Rule regarding alternates in deliberations. (See, *Commonwealth v. Smith,* 403 Mass. 484, 44 CrL 2263; *Commonwealth v. Sheey,* 51 CrL 10654 (4-15-92) (Upholds Per Se Rule in face of statute requiring bias)). The presence of an unqualified juror destroys the sanctity of the jury!

II

The circuit courts appear to be in conflict on where the burden of proof rests in a criminal case concerning the participation of an unqualified juror and whether prejudice need be shown, or the lack thereof and by which party.

It has been clearly established that a single venireman excluded as a juror improperly requires retrial. (*Batson v. Kentucky,* 476 U.S. 79, 90 L. Ed. 2d 69 (1986); *U.S. v. David,* 803 F.2d 1567 (CA 11 1986); *U.S. v. Battle,* 836 F.2d 1084 (CA 8 1987)). Should it not be even more sacred to allow the breach of the sanctity of the jury privacy by an unqualified interloper?

It was also clearly established in *Batson* that the Defendant need only bear the burden of a prima facia case and then the risk of non-persuasion shifts to the prosecution.

In fact, it is traditional in our system of justice that the burden of proof rests with the prosecution. Why then should it be shifted to the Defendant to prove an unfair trial or bias juror. It is submitted once the defect disqualification, or "fly in the ointment" is shown by the Defendant; the prosecution should bear the burden of proof to prove competency or fairness perhaps, more appropriately an inference or presumption of unfairness for which the prosecution bears the burden of rebutting. (See *Batson v. Kentucky,* Ibid, (concurring opinion White, J.)).

(See reason I for discussion of alternate Per Se unfair rule and civil *McDonough* standard conflict).

III

The Supreme Court has not considered searches and seizures concerning modern technology of computers-word processors and contemporary application of the Fourth Amendment thereto.

The seizure of the computer-word processor of the professional corporation law firm of which the Defendant was a part, with other attorneys offices there, that represented him in the matter and it's continued search beyond the scope of the warrant, and the 10 day time limit required by F.R.C.P. 41c(1) should, be clearly violative of the Fourth Amendments fundamental constitutional guarantees.

The modern technology of computer information and the nature of the equipment require fine tuning by this Honorable Court in order to protect the privacy and utilization of modern day equipment. This not only involves the Fourth Amendment rights against illegal searches and seizures but also the First Amendment Rights of publication and reproduction in other than traditional book and paper forms.

In this case, of course, the state of the art equipment in progressive law firms contains attorney-client confidential files just as sacred as the printed word processed "hard" forms. The IRS seizure of this equipment-hardware and software – trundling it off and searching it for several days beyond the ten (10) day proscription in the warrant and F.R.C.P. 41c(1) converts the search "pursuant to warrant" into a general search because it exceeded the scope, duration and limits of the warrant. (See, *Conner v. Johnson*, 287 NW2d 400 (Minn 1979); *U.S. v. Bithoney*, 631

F.2d (1st Cir 1980); *Lelitman v. Krut*, 744 F.2d 955 (3rd Cir 1984)).

The taking of this equipment was the same as if the IRS raiders had moved into the office for two (2) weeks continuing to rummage through and search files and information. Every memorandum, notes, research, correspondence, statements, financial records . . . were contained in the computer-word processor. Most exhibits at trial were the product of this two (2) week rape of records.

The Appellate Court in considering the "totality of the circumstances" did *not* consider the nature of this sophisticated modern equipment. Nor did they consider that this search was of a professional corporation law firm and not the individual law office of the one Defendant attorney. They passed over the requirements of 42 U.S.C. Section 2000 aa 11 and Department of Justice Tax Division Directive 52 (Appendix) requiring that permission of the Assistant Attorney General in charge of the tax division, were not complied with-no permission was requested or granted. They further failed to consider that while the 12 armed IRS agents were in control of the law firm they obtained a second search warrant, without any affidavits of probable cause and that the original warrant affidavits did not allege any criminal conduct.

The recent Supreme Court case of *Soldal v. Cook County*, No. 91-6516 (12-10-92) confirms that "property" is within the ambit of the Fourth Amendment search and seizure prohibition. It should be extended to clearly establish the sacred confidential nature of attorney-client

files and the modern technology that allows equipment-property to contain and publish such information.

IV

That affidavits to obtain a search warrant that do no allege, or state facts showing probable cause that a crime was committed but only legal conduct, are insufficient to justify search and seizure of documents and computer with attorney-client information from a law office.

The first warrant obtained in this case was obtained contrary to 42 U.S.C. Section 2000 aa 11 as noted above the second warrant was also obtained contrary to that statute. No affidavits of probable cause were used or offered in obtaining the second warrant. The first warrant has only one affidavit from the Internal Revenue Service special agent. He, in turn, summarized what alleged numbered informants had allegedly told him. The information he represented did not allege a crime. It alleged that over a three year period the sum of approximately $1,100.00 a year had not been deposited in banks. The other alleged conduct to justify a warrant issuing noted in the Appellate decision, was not in the affidavits but was offered in court at the suppression hearing, in an effort, to cure the defect.

It has *not* been clearly established that "probable cause" in obtaining a search warrant should allege facts showing a probable crime and should not be issued on allegations of legal conduct that do not show a prima facie probability of a crime. It is submitted that it should be analogized to the "probable cause" made out to arrest a subject.

The "totality of the circumstances test" from *Illinois v. Gates*, 462 U.S. 213 (1983) has not been clearly defined in this area, or perhaps it would be better to say what "evidence of a crime" is necessary (*Illinois v. Gates* at 238). It is submitted in our case, and many others, that the "probable cause mix" deteriorates into a mush of innocent details that do not establish the probable cause that a crime has been committed.

The IRS cannot rely upon objective reasonableness of reliance and subjective good faith set out in *U.S. v. Leon*, 468 U.S. 897 (1987). They willfully and knowingly failed to obtain Department of Justice approval for the issuance of a search warrant for a law firm. The "facts" of the affidavit did not show criminal conduct. They knew the 10 day limit for the search and searched the computer-word processor beyond that time. The warrant was issued for the Defendant attorneys individual office but the Internal Revenue Service searched the professional corporations **building.**

THE ISSUE OF WHETHER *LEON* PERMITS THE USE OF EVIDENCE SEIZED WHEN THE GOVERNMENT EXCEEDS THE SCOPE OF AUTHORITY UNDER A SEARCH WARRANT AS WAS DONE HERE HAS NOT YET BEEN DECIDED. This court in *Illinois v. Krull*, 480 U.S. 340 (1987) refused to extend *Leon* to "good faith" errors by the government, noting that unlike judges, government enforcement personnel are "engaged in the often competitive enterprise of ferreting out crime" and must remain subject to the exclusiveness rule so that it's deterrent effect tempers their competitive impulses. These matters should be resolved in our case.

V

That 26 U.S.C. Section 7207 (filing a false return) requires fraud as an element and is not a lesser included offense of 26 U.S.C. Section 7201 (wilful tax evasion) that does not require an element of fraud.

Filing a false return or fraudulent return under 26 U.S.C. Section 7207 requires "fraud" as an element. Tax evasion under 26 U.S.C. Section 7201 does not. This is a material and substantial difference removing 26 U.S.C. Section 7207 from the ambit of a lesser included offense of 26 U.S.C. Section 7201. By definition a "lesser included offense" it should not require any proof or defense of facts not also required to prove the greater charge.

In our case, the IRS improperly moved income of the Defendant from 1984 to 1985 so that it could obtain administrative approval of the Department of Justice under their guidelines requiring three consecutive years of at least $2,500.00 tax owed.

The evidence disclosed the IRS impropriety, and at the close of all the evidence the Court granted a Motion For Dismissal, of Count III, of the grand jury indictment. The Court then without taking further evidence, submitted the "lesser included offense" to the jury.

It should also be noted that when the income moved to 1985 by the IRS was put back into 1984 there was no tax loss in 1985. There was actually no other evidence of any false or fraudulent information on the 1985 return.

In the cases of *U.S. v. McBride,* 602 At.2d 626 (D.C. Ct. App. 1992) and *U.S. v. Shorter,* 570 At.2d 760 (D.C. Ct. App. 1990); the Court held that willful tax evasion under

Section 26 U.S.C. Section 7201 was not a crime involving moral turpitude because it did not have an element of fraud, only "wilfulness" therefore, 26 U.S.C. Section 7207 cannot as a matter of law be a lesser included offense of 26 U.S.C. Section 7201.

The change in "crimes" by the Court after the close of the evidence was a constructive amendment which was not considered by a grand jury. But even more important, it was a charge with different elements for which the Defendant did not have an opportunity for his day in Court. This is error Per Se. (See, *Grady v. Corbin*, 110 S.Ct. 2084 (1990); *U.S. v. Leisure*, 844 F.2d 1347, 1365 (8th Cir. 1988)). This violates the Fifth Amendment right to submit all charges to a grand jury. The Appellate court assumes this is a lesser included offense and claims notice was adequate. It is in error.

An attorney cannot waive a Defendant's fundamental constitutional rights. (See, *U.S. v. Smedes*, 760 F.2d 109 (IA, 1983)).

VI

That is error for a court not to give an instruction on each theory of defense.

The circuit overlooked that only one instruction was given regarding intent and wilfulness, and reliance on accountant tax preparers, instruction No. 8, omitting defenses to which the accused was entitled. This instruction is contrary to *Cheeks v. U.S.*, 111 S. Ct. 604 (1991). In addition, this solitary instruction did not cover the wide range of defenses under the intent-reliance dichotomy

under the facts and evidence in this case. It did not allow the jury to find a defense because of:

A) A misunderstanding of the tax law and/or mistake (See, e.g. *U.S. v. Burton*, 737 F.2d 439, 441 (CA 5 1984)); note, REASON FOR WRIT EIGHT EVIDENCES THE LEGAL BASIS FOR "TWO CRIMES" IS STILL IN DOUBT!

B) "Availability" of information in contrast to it being "furnished". In this case, all tax preparing C.P.A.'s had access and availability to all records. They were not simply 3rd party tax preparing C.P.A.'s but rather, an inhouse bookkeeper on a weekly basis with a key and access to all information, to Counts I, II, and III; in regard to Counts IV and V the taxpreparer was also an "expert" custodian storing *all* records of the accused taxpayer had them "available".

C) The shifting burden of responsibility from tax payer to the expert C.P.A. and the responsibility of the C.P.A. to inquire further as provided by their professional standards. (American Institute Certified Public Accountants standard 18, 071-TX Section 127.06; 18, 091-TX Section 132.06 require a C.P.A. preparing tax returns to "make reasonable inquiry" and not "ignore the implication of information furnished".) Here the C.P.A.'s *had available all* information, but were expressly furnished an amortization schedule showing the date of transaction, total amount due, installment payments, dates received, amount of interest and principal (Exhibit CT) they should have inquired into the nature of the transaction if they didn't know. Instruction number 8, contrary to recognized practice and standard stated that the tax preparer did not have to make inquiry.

D) Mistaken reliance on facts or charges of the C.P.A. and monthly billings for "cash receipt reconciliation" when case receipt books were stacked with bank deposit books.

E) Mistaken understanding of the law as to redemption of stock with release and renunciation of claims for payment of damages. (It is submitted this understanding was correct and '88 and '89 transaction was not taxable income offenses – but the instruction did not allow the jury to find such defense.)

F) The instruction did not allow the accused taxpayer to rely on his C.P.A. tax preparer bookkeeper to factually total income. Humphreys did not generally write checks, make deposits, or do any bookkeeping-accounting procedures. He was out of the loop on accounting. He relied on a one line gross income entry by the C.P.A. to include all income (e.g. he relied on the C.P.A. computation that his income was $200,000.00 not $210,000.00 – the difference was 5-10% of gross income and would not be apparent to anyone). That is the crime here! The sole instruction did not allow jury acquittal on this defense.

G) Mistake or reliance, on or by his inhouse staff that actually handled accounting (e.g., office manager bookkeeper, receptionist making deposits, receipting for income and recording it). THEY HAD THE CORRECT INCOME ON INHOUSE RECORDS THAT FOR SOME REASON THE C.P.A. MISSED! THE INTERNAL REVENUE SERVICE TERMED THE INHOUSE RECORDS AS "SURPRISINGLY ACCURATE".

The consolidation in one instruction without sufficient detail rather than three recognizing the different circumstances robbed the accused of his fundamental constitutional rights to the basic defense. The defenses were primarily affirmative in nature, i.e., admitting minor mistakes by his staff and C.P.A. tax preparer bookkeeper and "experts", but denying intent (see above). These instructions deny him that recognized right contrary to *Cheeks v. U.S.*, 111 S. Ct. 604 (1991).

VII

That 18 U.S.C. Section 3237b was enacted to specifically apply to a case under the facts of this case in which tax returns were filed in one district and prosecution was initiated in another.

The circuit decision summarily dismisses the amended motion attacking venue and vouchsafing a transfer under 18 U.S.C. Section 3237b as untimely and fails to consider the pleading doctrine of "relation back"; and the fact that the Court expressly reserved the Defendant's right to renew this motion. It was not an untimely new motion! The *only* affirmative act of Humphreys upon which prosecution was based for '88 and '89 was signing and filing. That is his only personal action. Both of which took place in Texas. The venue statute does apply and the circuit's failure to do so denies the accused a fundamental right. If the statute does not apply in this case, it would not apply in any case!

The only acts of the Defendant upon which prosecution is based are the signing and filing of the returns in Texas.

VIII

There is a conflict in circuit courts over whether the basis in stock of subchapter 'S' corporation is affected by personal guarantees of loans which is the basis of two criminal convictions in this case.

The charges for 1988 and 1989 involve a stock redemption by a corporation that had elected subchapter 'S' status on incorporation. It borrowed money which the Defendant personally guaranteed, well in excess of the amount later paid to him. Money that would have otherwise have been paid to the Defendant was paid on the loan. Subchapter 'S' corporations are taxed as partnerships.

In a partnership the loan would have been considered a part of the basis of a partner. In a subchapter 'S' corporation the same theory has applied until recently.

In 1993, the tax court has held that loan guarantees do not increase the subchapter 'S' corporate stockholders' basis (Keech, T.C. Memo 1993-71). One circuit court of appeals disagrees with this position. (Harper, D.C. Tex 93-1 USPC pp. 50, 149). Four circuit courts agree. But this entire problem could have been avoided with some competent advice from a C.P.A. (something sorely lacking in this case). Defendant Humphreys could have borrowed the funds and loaned them to the corporation.

But we are dealing here with a crime where the basis was established from 1984 to 1988. The law was more uncertain then.

This Honorable Court should resolve this variance in the Appellate Courts and in so doing, establish that such

uncertainty in the law should not be the basis for a crime and that the Court should have so instructed on it. Not to do so is a violation of the Defendant's basic constitutional rights.

CONCLUSION

For these reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 52

The Authority to Execute Title 26 or
Tax-related Title 18 Search Warrants

Pursuant to the authority vested in my [sic] by Part O, Sub-Part N of Title 28 of the Code of Federal Regulations, Section 0.70, delegation of authority with respect to approving the execution of Title 26, U.S.C., or tax-related Title 18, U.S.C., search warrants directed at offices, structures, premises, etc., owned, controlled or under the dominion of the subject or target of a criminal investigation, is hereby conferred upon:

1. Any United States Attorney appointed under Section 541 of Title 28, U.S.C.,

2. Any United States Attorney appointed under Section 546 of Title 28 U.S.C.,

3. Any permanently appointed representative within the United States Attorney's office assigned as First Assistant United States Attorney,

4. Or to any permanently appointed representative within the United States Attorney's office assigned as chief of criminal functions.

This delegation of authority is expressly restricted to these, and no other individuals.

This delegation of authority does not affect the statutory authority and procedural guidelines relating to the

use of search warrants in criminal investigations involving disinterested third parties as contained in 28 C.F.R. Section 59.1, *et seq.*

The Tax Division shall have exclusive authority to seek and execute a search warrant that is directed at the offices, structures or premises owned, controlled, or under the dominion of a subject or target of an investigation who is:

1. An accountant;
2. A lawyer;
3. A physician;
4. A local, state, federal, or foreign public official or political candidate;
5. A member of the clergy;
6. A representative of the electronic or printed news media;
7. An official of a labor union;
8. An official of an organization deemed to be exempt under Section 501(c)(3) of the Internal Revenue Code.

Any application for a warrant to search for evidence of a criminal tax offense not specifically delegated herein must be specifically approved in advance by the Tax Division pursuant to Section 6-2.330 of the United States Attorney's Manual.

Notwithstanding this delegation, the United States Attorney or his delegate has the discretion to seek Tax Division approval of any search warrant or to request the advice of the Tax Division regarding any search warrant.

The United States Attorney shall notify the Tax Division within ten working days, in writing, of the results of each executed search warrant and shall transmit to the Tax Division copies of the search warrant (and attachments and exhibits), inventory, and any other relevant papers.

The United States Attorney's Manual is hereby modified effective January 2, 1986.

/s/ Roger M. Olsen
Roger M. Olsen
Acting Assistant Attorney General
Tax Division

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3812

UNITED STATES OF AMERICA, Appellee, v. LLOYD E. HUMPHREYS, Appellant.	*	Appeal from the United States District Court for the Northern District of Iowa.

Submitted: October 14, 1992

Filed: December 7, 1992

Before FAGG and BOWMAN, Circuit Judges, and LARSON,* Senior District Judge.

LARSON, Senior District Judge.

Lloyd E. Humphreys appeals from his conviction by jury trial on four counts of income tax evasion and one count of filing a false income tax return. In addition, Humphreys appeals from the district court's[1] denial of

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* The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation

[1] The Honorable David R. Hansen was a United States District Judge for the Northern District of Iowa at the time judgment was entered. He was appointed to the United States Court of Appeals.

his motions for a new trial, to suppress evidence, and to sever and transfer his case to Texas. We affirm the judgment of the district court in all respects.

I.

Lloyd E. Humphreys is an attorney who practiced law in Cedar Rapids, Iowa. Humphreys was indicted on three counts of tax evasion (count 1, 2, and 3) for the tax years 1983, 1984, and 1985. Humphreys failed to report numberous [sic] legal fees which he received in either trade or undeposited cash during those tax years. He also failed to report additional fees which were run through an unreported escrow account. Humphreys's defense to the charges was that he relied in good faith upon his accountant/tax preparer. However, testimony revealed that Humphreys failed to inform the accountant of the cash receipts and the currency receipt books which were kept, or of the existence of the escrow account.

A superseding indictment added two more counts of tax evasion (counts 4 and 5) for the tax years 1988 and 1989. Humphreys assisted in the formation of a corporation in 1981. In addition to several questionable practices which have no bearing on this matter, Humphreys received 25% of the stock issued by the corporation in exchange for legal advice. At various times Humphreys loaned the corporation money and guaranteed three SBA loans. All loans were paid in full, with interest. In 1988, Humphreys agreed to sell his stock in the corporation, and received a down payment of $10,000.00. Thereafter, thought out 1988 and 1989, Humphreys received monthly payments of principal plus interest. Humphreys did not

report the downpayment or the principal payments and did not inform his accountant of the stock sale. While Humphreys did report the interest payments, under the false premise that he had a basis in the stock, he did not provide his accountant with any information regarding the claimed basis.

Humphreys filed a motion to suppress evidence seized from his law office under a search warrant. An evidentiary hearing was held and the motion was denied. Humphreys's motion to sever and transfer counts 4 and 5 was also denied. At the close of the evidence Humphreys moved for acquittal, based upon insufficiency of the evidence. The district court ruled that the evidence was insufficient to support a conviction of tax evasion under count 3 (26 U.S.C. Section 7201), and replaced the count with the lesser included offense of misdeamnor [sic] filing a false return (26 U.S.C. Section 7207).

II.

A. Suppression of Evidence

Humphreys's motion to suppress evidence stems from a search of his law office, conducted to two search warrants authorized by a United States Magistrate. Humphreys alleges that the district court erred in its denial of the motion because: 1) the affidavits in support of the search warrants failed to support a finding of probable cause and, more specifically, failed to allege anything more than a *de minimis* omission of income; 2) the reliability of certain informants was not established

and, moreover, the affidavits contained material omissions and false and misleading statements; and 3) privileged attorney-client documents were seized in the search. We review the court's rulings on the motion to suppress under the clearly erroneous standard. *United States vs. Johnson,* 925 F.2d 1115 (8th Cir. 1991) *United States v. McGlynn,* 671 F.2d 1140 (8th Cir. 1982).

The magistrate issuing the search warrants was required to find that there was probable cause that Humphreys was willfully attempting to evade the payment of taxes by understating his income. The applicable standard of probable cause has been set forth by the Supreme Court: "[I]t is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Illinois vs. Gates,* 462 U.S. 213, 235 (1983) (citation omitted). The Court further stated:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to insure that the magistrate had a "substantia basis . . . for conclud[ing]" that probable cause existed.

Illinois vs. Gates, 462 U.S. at 238 (quoting *Jones v. United States,* 362 U.S. 257, 271 (1960)). Here, the affidavits clearly demonstrated that Humphreys was not reporting all cash income. The affidavits showed that cash receipts

from clients were not being deposited to Humphreys's business account, that his tax preparer relied solely upon the deposit records, and that former employees were instructed by Humphreys to give him all cash, which he then placed in his desk or in a safe. Certainly the magistrate, and ultimately the district court, had a substantial basis for making the practical, common sense decision, based upon a totality of circumstances, that probable cause existed. *See United States vs. Peterson*, 867 F.2d 1110, 1113 (8th Cir. 1989).

Humphrey's [sic] assertion that the affidavits are deficient unless they state a specific, "substantial" amount of tax deficiency is simply unsupported. The essence of the inquiry was whether there was tax due and whether Humphreys willfully attempted to evade the tax. Where the affidavits made the clear connection between the existence of the unexplained funds and the allegations of underreporting (citing the applicable criminal statute), we hold that sufficient facts were set forth to establish the probability of criminal activity.

The court need not engage in a searching, lengthy review of the statements of the various informants and affiants. The magistrate below permitted an extensive hearing on the issues raised under *Franks vs. Delaware*, 438 U.S. 154 (1978).[2] The magistrate then penned a comprehensive and detailed Report and Recommendation,

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[2] In order to prevail on a challenge to warrant affidavit under *Franks vs. Delaware, supra*, a defendant must show: 1) that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit, and 2) that the affidavit's remaining content is insufficient to establish probable cause. The same analysis applies to omissions of fact.

addressing each and every one of Humphrey's allegations of false and misleading statements, and omissions of fact, and concluding that Humphreys's allegations were insufficient to support a *Franks* challenge. Having carefully reviewed the magistrate's recommendations, we are satisfied that the district court's denial of Humphreys's motion was not clearly erroneous. None of Humphreys's allegations case doubt upon the existence of probable cause. Humphreys fails to understand that, while *he* may believe that the informants lacked credibility; where the informants information is at least partially corroborated, attacks upon credibility and reliability are not crucial to the finding of probable cause. *See United States v. Flagg,* 919 F.2d 499 (8th Cir. 1990); *United States v. Parker,* 836 F.2d 1080 (8th Cir. 1987).

Shortly after the commencement of the search of Humphreys's law office, IRS agents were informed of the presence and location of attorney-client privileged files pertaining to this case. Humphreys alleges that these very files were taken, pillaged, and ultimately used against him. The burden is clearly upon Humphreys to demonstrate that he was prejudiced by the alleged actions of the IRS. *See United States v. Morrison,* 449 U.S. 361, 365 (1981); *Weatherford v. Bursey,* 429 U.S. 545 (1977). Humphreys is required to show documents were privileged, *cf. In re*

The defendant must show: 1) that facts were omitted with the intent to make, or in reckless disregard of whether they thereby make, the affidavit misleading, and 2) that the affidavit, if supplements by the omitted information, could not support a finding of probable cause. *United States vs. Sueth,* 807 F.2d 719, (8th Cir. 1986); *United States v. Reivich,* 793 F.2d 957, 960 (8th Cir. 1986).

Grand Jury Proceedings, 791 F.2d 663, 666 (8th Cir. 1986) (in which the burden rested upon individual subpoenaed by grand jury to establish that information sought fell within attorney-client privilege), and that illegality of the manner in which they were allegedly obtained. Here, Humphreys provided nothing more than speculation and contradictory statements. No files or documents were produced for the review of the district court, and no objection was made during the trial on the grounds that evidence introduced was illegally obtained. Even if the search was overbroad in its scope, no showing of its effect upon the prosecution has been made. Humphreys has not demonstrated that he was prejudiced.

B. Severance

Humphreys launches a two pronged argument in support of his contention that the district court erred in denying his motion for severance of counts 4 and 5 from counts 1, 2, and 3 under Rule 14 of the Federal Rules of Criminal Procedure. First, Humphreys urges that the documents, witnesses, and proof supporting counts 4 and 5 are totally different from those supporting 1, 2, and 3. Second, Humphreys argues that his right to a fair trial has been abridged because of the "spillover effect" of the evidence pertaining to the first three counts onto the latter two counts. Under the explicit language of Rule 14, Humphreys must demonstrate prejudice from the joinder of the counts. *United States v. Adkins*, 842 F.2d 210 (8th Cir. 1988); *United States v. Starr*, 584 F.2d 235 (8th Cir. 1978) (stating that the burden is a heavy one). Bearing in mind that joinder of all offenses against a defendant is a

favored practice, we will not reverse the district court's refusal to grant severance absent a clear abuse of discretion. *United States v. Dennis*, 635 F.2d 782, 801-802 (8th Cir. 1980).

While, according to Humphreys, the dissimilarities in the two "sets" of evidence are legion (time, geographical location, business entities, tax preparers, type and complexity of transactions), the similarities carry the day. The type of offense (tax evasion through underreporting) is the same. Indeed, the method of committing the offense (failing to inform the tax preparer of income generated, whether from legal fees or stock sales) is the same. *United States v. Lindsey*, 782 F.2d 116 (8th Cir. 1986) (stating that the crimes need only be similar or nearly corresponding in nature). Most persuasive is the fact that the evidence in each set of counts is mutually admissable to show Humphreys's motive, intent, and pattern of criminal behavior, and to negate Humphreys's defenses. *See* Fed. R. Evid. 404(b). Where evidence of one crime would be admissable at a separate trial for another crime, a joint trial does not engender additional prejudice. *United States v. Dennis*, 625 F.2d at 802.

We completely dismiss the notion that the "spillover effect" fatally prejudiced Humphreys's case. The sheer volume of the evidence compiled in support of counts 1, 2, and 3 was substantially greater, due to the nature of the transactions. However, the fact that Humphreys may have had a better chance for acquittal in separate trials is not a sound basis for severance. *United States v. Brim*, 630 F.2d 1307 (8th Cir. 1980), *cert denied*, 452 U.S. 966 (1981); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980). The stock sale was not a complex transaction, beyond the

jury's ability to decipher and compartmentalize the evidence.

C. Venue

Humphreys's original motion to sever and transfer this case to Texas included all five counts and was based upon his belief that the United States Attorney has a "vendetta" against him and that pretrial publicity reduced his ability to receive an impartial trial. Humphreys's renewed motion to sever and transfer invoked for the first time the right to transfer under 18 U.S.C. Section 3237(b).[3] The district court denied the renewed motion

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[3] Title 18, U.S.C., Section 3227, states:

Section 3237. Offenses begun in one district and completely in another.

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completely [sic] in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

* * *

(b) Notwithstanding subsection (a), . . . *where venue* for prosecution of an offense described in section 7201 . . . *is based solely on a mailing* to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to the tried in district in which he was residing at the time the alleged offense was committed: *Provided,* That the motion is filed within twenty days after arraignment of the defendant upon indictment or information. (Emphasis supplied.)

because: 1) it was untimely, and 2) Section 3237(b) applies only where venue is based on mailing. We find no error in the district court's ruling. An untimely motion may be denied at the lower court's discretion. A belated attempt to bootstrap the argument to an earlier, unsuccessful, and clearly different argument does not save the motion from its demise.

Venue in this instance was not based *solely* on a mailing to the IRS, but upon the *commission* of a crime in the Northern District of Iowa. The indictment plainly charges that Humphreys committed the offenses "by preparing and causing to be prepared and by signing and causing to be signed," false returns. Humphreys made a conscious choice, through his volitional acts, to have contact with the district. He presented the tax information and records to his tax preparers in Iowa, and he instructed that the returns be prepared in Iowa. Humphreys's mailing of the returns from his home in Texas is of not import to this inquiry. Much ado has been made by both parties of the meaning and legislative history of Section 3237(b). However, the plain language of the *entire* statute mandates the conclusion that the provisions of subsection (b) were not intended to apply to this situation. *See Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987) (where statutory terms are unambiguous, judicial inquiry is complete). Granting a *de facto* severance where a defendant has clearly committed the continuing tax evasion crime in a given district, and venue is not based *solely* upon the mailing of a completed tax return, is not the result intended.[4]

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[4] The only case cited to this court which discusses Section 3237(b) subsequent to its 1984 amendment (Tax Reform Act of

Humphreys cannot complain of undue burden or inconvenience. All of the evidence and witnesses, same Humphreys himself, were in Iowa, the income generated and deposited at least in part in Iowa, and the tax returns were prepared in Iowa. Moreover, Humphreys was required to be in Iowa for the prosecution of counts 1, 2, and 3.

D. Juror Disqualification

At trial, the court's voir dire questioning revealed that one of the jurors had been convicted thirty-one years earlier on an embezzlement charge. Subsequent to entry of the verdict, Humphreys discovered that the juror's civil rights had not been restored. Humphreys then brought a motion for new trial, claiming statutory disqualification of the juror. A hearing was held at which the juror testified. It is abundantly clear from the record that the juror was operating under a good faith belief that he was at all times a qualified juror, and that he did not fear retaliation form [sic] the government if he voted for acquittal. Humphreys's claims to the contrary are, at best, disingenuous.

Failure to have one of the juror qualifications set forth at 28 U.S.C. Section 1865(b) should not necessarily render an individual fundamentally unfit to serve. Rather, it should serve as a basis for challenge to the

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1984, Pub.L.No. 98-369, 98 Stat. 697) is *United States v. Melvan*, 676 F. Supp. 997 (C.D. Cal. 1987). See *United States v. Marchant*, 774 F.2d 888 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986), for a pre-amendment decision.

person's qualifications.[5] We are in agreement with the recent holding of the District of Columbia Circuit Court of Appeals, in which the court stated:

> The Sixth Amendment right to an impartial jury does not require an absolute bar on felon-jurors. The touchstone of the guarantees of an impartial jury is protection against juror bias. A per se rule would be appropriate only if one could reasonably conclude that felons are always biased against one party or another. Congress' purpose in restricting, in 28 USC 1865-67, jury service by felons seems to stem from consideration other than a concern about biased jurors. More important, a per se rule in this context seems inconsistent with the hostility expressed in *McDonough Power Equipment Inc. v. Greenwood,* 464 U.S. 548 (1984), to unnecessary new trials and to the axiom that a defendant is entitled to a fair trial but not a perfect one. We think, therefore, that the Sixth Amendment does not require automatic reversal of every conviction reached by a jury that included a felon.

United States v. Boney, ___ F.2d ___ (D.C. Cir. 1992), 1992 WL 267481.

It is the defendant's duty to investigate, to question, and to assert a challenge *prior* to the return of the verdict. If actual bias or prejudice is revealed, and obvious challenge for cause is timely presented. If not, the court may still determine the necessity of taking remedial action, such as the seating of an alternate juror. In an effort to obtain a new trial, it is incumbent upon the defendant to

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[5] *See Ford v. United States,* 201 F.2d 300 (5th 1953).

clearly demonstrate that the juror's lack of qualifications presented actual bias or prejudice, affecting the juror's impartiality and impacting the fairness of the trial.[6] A challenge after the verdict without such a showing comes too late.[7]

Humphreys challenge fails in both respects. Humphreys did not pursue any questioning of the juror on voir dire. Nor did he further investigate or raise any challenge during trial. Having failed to diligently and timely discover the relevant information, he is precluded from being heard on the issue of juror qualification. At the conclusion of the hearing on Humphreys's motion, the district court specifically found that there was no evidence of either bias or unfairness as a result of the seating of this juror. This conclusion is not clearly erroneous and we have no inclination to set it aside. *See United States v. Miscellaneous Firearms & Ammunition,* 945 F.2d 239 (8th

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[6] In those cases addressing a challenge for cause based upon bias or prejudice, the Court has stated:

> To obtain a new trial . . . a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 556 (1984).

[7] See *Shotwell Manufacturing Co. v. United States,* 371 U.S. 341 (1963), where an objection to the petit jury array brought four years after the verdict was returned was not timely, the relevant information was available before entry of the verdict through due diligence, and no prejudice was shown.

Cir. 1991). The court did not abuse its discretion in refusing to grant Humphreys motion for a new trial.

E. Lesser Included Offense

Much to the benefit of Humphreys, the district court reduced the charge on count 3 from tax evasion to the lesser included offense of filing of a false return. The court ruled, and Humphreys agreed, under *Sansone v. United States*, 380 U.S. 343 (1965), that 26 U.S.C. Section 7207 is a lesser included offense of 26 U.S.C. Section 7201. Humphreys received adequate notice of the possibility of conviction on the lesser included charge when he was charged with the greater offense. *See Schmuck v. United States*, 489 U.S. 705 (1989).

F. Jury Instructions

Humphreys raises objections to those jury instructions regarding intent and wilfulness. We have reviewed the jury charge as a whole, and we hold that the instructions fairly and adequately instruct the jury as to the substantive law in this matter. *United States v. Cheatham*, 899 F.2d 747, 751 (8th Cir. 1990) (stating that a defendant is not entitled to a particularly worded instruction where the instructions given, when viewed as a whole, adequately and correctly cover the substance of the requested instruction). The district court has wide discretion in the formulation of jury instructions, *United States v. Walker*, 817 F.2d 461 (8th Cir.), *cert denied*, 484 U.S. 863 (1987), and we hold that it did not abuse that discretion in this matter.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3812NICR	*	
	*	
United States of America,	*	Appeal from the
Appellee,	*	United States Dis-
	*	trict Court for the
vs.	*	Northern District
	*	of Iowa.
Lloyd E. Humphreys,	*	
Appellant.	*	
	*	

The petition for rehearing by the panel is denied.

January 21, 1993

Order Entered at the Discretion of the Court:

/s/
Clerk, U.S. Court of Appeals, Eighth Circuit

Rule 41. Search and Seizure

(c) Issuance and Contents.

(1) Warrant Upon Affidavit. A warrant other then a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The funding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes

its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

* * *

Rule 606. Competency of Juror as Witness

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

* * *

18 U.S.C.S. § 3237. Offenses begun in one district and completed in another

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954 [26 USCS § 7203], or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code [26 USCS § 7201 or 7206(1), (2), or (5)] (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed. Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

§ 2000aa – 11. Guidelines for federal officers and employees

Procedures to obtain documentary evidence: protection of certain privacy interests

(a) The Attorney General shall, within six months of October 13, 1980, issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of an offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials sought are not contraband or the fruits or instrumentalities of an offense. The Attorney General Shall incorporate in such guidelines –

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;

(2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained;

(3) a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between clergyman and parishioner; lawyer and client; or doctor and patient; and

(4) a requirement that an application for a warrant to conduct a search governed by this

subchapter be approved by an attorney for the government, except that in an emergency situation the application may be approved by another appropriate supervisory official if within 24 hours of such emergency the appropriate United States Attorney is notified.

Use of search warrants; reports to Congress

(b) The Attorney General shall collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and the House of Representatives on the use of search warrants by Federal officers and employees for documentary materials described in subsection (a)(3) of this section.